No. 17-10448

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

JOSEPH M. ARPAIO,

Defendant-Appellant.

BRIEF OF AMICI CURIAE CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF NEITHER PARTY

Appeal from the United States District Court
District of Arizona
2:16-cr-010120-SRB-1

R. Bradley Miller
GUTTMAN, BUSCHNER AND BROOKS PLLC
2000 P. Street, N.W., Suite 300
Washington, D.C. 20036
(202) 800-3001
bmiller@gbblegal.com

Spencer G. Scharff
SCHARFF PLLC
502 W. Roosevelt Street
Phoenix, Arizona 85003
(602) 739-4417
spencer@scharffplc.com

Counsel for Amici Curiae
Certain Members of the Congress of the United States

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. No counsel for a party authored this brief in whole or in part, and no person, other than *amici* or their counsel, made any monetary contribution to the preparation or submission of this brief.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are members of Congress. They are Representatives Jerrold Nadler, Steve Cohen, Henry C. "Hank" Johnson, Jr., Theodore E. Deutch, David Cicilline, Eric Swalwell, Ted Lieu, Pramila Jayapal, Sylvia Garcia, Joe Neguse, Madeleine Dean, Veronica Escobar, Jim Costa, Adriano Espaillat, Dwight Evans, Ruben Gallego, Raúl M. Grijalva, Barbara Lee, Grace F. Napolitano, Eleanor Holmes Norton, Frank Pallone, Jr., Jackie Speier, Juan Vargas, and Nydia M. Velázquez (collectively, the "Congressional *Amici*").

The *amici* have an interest in protecting the division of powers among the executive, legislative, and judicial branches of government set forth in the Constitution. The *amici* regard that division of government powers as essential to the preservation of liberty, as did the framers.[1]

The presidential pardon upon which the Defendant Arpaio's motion below was based is an encroachment by the Executive on the independence of the Judiciary. The *amici* urge the Court to defend jealously against that encroachment as the Framers intended.

[1] *Amici* could offer as authority for that proposition any number of passages from *The Federalist Papers*, court decisions, speeches and writings of American leaders, learned treatises, and the like. This is a foundational principle of American democracy. "Power must never be trusted without a check." John Adams, in a letter to Thomas Jefferson, Feb. 2, 1816.

The power to impose sanctions for contempt of court is an inherent power that is essential to the independence of the judiciary, just as the power to impose sanctions for contempt of Congress is an inherent power that is essential to the independence of the legislative branch, as the Supreme Court held in *Anderson v. Dunn*, 19 U.S. 204 (1821). Even without contempt of court statutes, the Court said, "that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates…." *Id*. at 227. And each chamber of Congress necessarily has the same implied power "to guard itself from contempts, [rather than be exposed] to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it." *Id.* at 228.

A presidential pardon of contempt of court or of contempt of Congress is thus an encroachment on the independence of those co-equal branches of government. The exercise of the pardon power in the circumstances here was not to ameliorate an unduly harsh criminal punishment or to correct a mistake in the enforcement of the criminal law—the intended purpose of the power—but to deprive the judiciary of the means to vindicate the authority of the courts. The effect of the pardon is to subject the judiciary's authority to enforce prohibitory injunctions, even prohibitory injunctions issued in private litigation, to the approval of the executive.

The *amici* also have an interest in protecting the rights and remedies provided by legislation. The Arpaio pardon defeats the private right of action under 42 U.S.C. § 1983 for prohibitory injunctive relief from the deprivation of the rights, privileges, and immunities under color of State law.

The Government did not appeal from the trial court's order to spare the Defendant Arpaio from punishment for criminal contempt of court based upon the presidential pardon, and time to file notice of appeal from that order expired before this Court appointed the Special Prosecutor. Nevertheless, the validity of the pardon is the threshold question before this Court. In other words, if the pardon was invalid, Defendant Arpaio would have no legal basis to demand that the orders in his prosecution be vacated. Moreover, Defendant Arpaio's decision to present arguments attacking the merits of his conviction in his Opening Brief places the validity of the pardon squarely before this Court.

ARGUMENT

I. THE POWER TO PUNISH ACTS OF DISOBEDIENCE TO COURT ORDERS IS ESSENTIAL TO THE INDEPENDENCE OF THE JUDICIARY.

Sanctions for contempt can be imposed under civil or criminal procedures, and can be remedies for private litigants or purely punitive. Sanctions for contempt, as an inherent power of the courts, predate contempt statutes. The law

of contempt has evolved over the centuries, but it has always been clear that contempt powers are required

> to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it…[their] judgments and decrees would be only advisory.
>
> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.
>
> This power has always been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens.

Gompers v. Buck Stove & Range Co., 221 U.S. 418, 450 (1911) (citation omitted).

II. THE PARDON POWER EXISTS TO ALLOW RELIEF AS A MATTER OF GRACE FROM UNDUE HARSHNESS OR EVIDENT MISTAKE IN THE ADMINISTRATION OF THE CRIMINAL LAW, NOT TO SUBJECT THE JUDICIARY TO SUPERVISION BY THE EXECUTIVE.

The Supreme Court addressed the applicability of the pardon power to contempt of court in very different circumstances in *Ex Parte Grossman*, 267 U.S.

87 (1925).[2] There the defendant sold liquor to be consumed on his business premises in violation of Prohibition. In other words, the defendant ran a speakeasy. The trial court issued an order that the defendant stop. Less than two months later, the defendant was caught selling liquor again. The trial court found the defendant guilty of contempt of court and sentenced him to imprisonment for one year and to a $1000 fine. The President thought that too harsh and reduced the sentence to the fine on the condition that the defendant pay the fine. The trial court denied the President's power to pardon or commute contempt of court and committed the defendant to imprisonment. The Attorney General appointed special counsel to argue to uphold the imprisonment, but argued as *amicus* that the pardon was valid.

The Supreme Court upheld the pardon. The Court distinguished civil and criminal contempt:

> [I]t is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts, the

[2] The greater weight of legal authority before the *Grossman* decision was that neither contempt of court nor contempt of Congress is subject to the President's pardon power. *See, e.g.*, *The Laura*, 114 U.S. 411, 413 (1885) ("It may be conceded that, except in cases of impeachment and where fines are imposed by a co-ordinate department of government for contempt of its authority, the President, under the general, unqualified grant of power to pardon offences against the United States, may remit fines, penalties and forfeitures of every description…."). The Court in *Grossman* described that authority as *obiter dictum* or as views "stated merely in passing." 267 U.S. at 118.

> sentence is punitive and in the public interest to vindicate the authority of the courts and to deter other like derelictions.

Id. at 111. Criminal contempts, the Court held, were "Offences against the United States" subject to the President's power to pardon. "These contempts are infractions of the law, visited with punishment as such." *Id.* at 116. The pardon power "exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt . . . It is a check entrusted to the executive for special cases…in confidence that he will not abuse it." *Id.* at 120–21.

III. AN ABSOLUTE, UNQUALIFIED PRESIDENTIAL POWER TO PARDON WOULD BE AN IMPEDIMENT TO THE CONSTITUTIONAL DUTY OF THE JUDICIARY TO DO JUSTICE AND WOULD CONFLICT WITH THE FUNCTION OF THE COURTS.

Any reading of *Grossman* as holding that the Executive's power to pardon is absolute and unreviewable, or that contempt of court is just another crime that gives rise to no particular concern for the independence of the judiciary, is incompatible with later decisions on claims of absolute, unreviewable executive branch power. The Executive Branch is seldom bashful to assert such claims, which the courts properly regard skeptically.

Young v. U.S. ex rel. Vuitton et Fils, 481 U.S. 787 (1987), a more recent decision, is more pertinent to the issues presented by the Arpaio pardon. There the

defendant sold counterfeit Vuitton and Gucci leather goods. The defendants consented to a permanent injunction in private litigation for trademark infringement. An undercover investigation five years later caught defendants still selling counterfeit leather goods in violation of the injunction. The court appointed private counsel to prosecute criminal contempt of court charges and a jury returned a guilty verdict. The defendants received sentences that ranged from six months to five years.

The defendants argued that criminal contempts "are essentially conventional crimes, prosecution of which may be initiated only by the Executive Branch." Only the United States Attorney's Office, the defendants argued, could bring a prosecution for criminal contempt. The Court held that the "power to punish for contempts is inherent in all courts…and may be regarded as settled law. It is essential to the administration of justice." *Id.* at 795 (block quotation and citation omitted). "The ability to punish disobedience to judicial orders is regarded as essential to ensuring the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Id*. at 796. The power to appoint private attorneys to prosecute contempt of court "satisfies the need for an independent means of self-protection." *Id.*

Courts thus have a ready means to vindicate their authority if the President orders federal prosecutors to drop a contempt of court charge—reportedly the

President's initial plan for this matter from which Attorney General Jeff Sessions dissuaded him. But a full and unconditional presidential pardon also effectively deprives the Court of "the independent means of self-protection," and makes the Court dependent on the Executive. The decision in *Vuitton* is entirely consistent with other more recent decisions where claims of unlimited executive power intrude on the powers of the judiciary or of Congress.

In *United States v. Nixon*, 418 U.S. 683 (1974), the President argued that the courts were without jurisdiction to consider "an intra-branch dispute" between the President and the Special Prosecutor and issue subpoenas that the Special Prosecutor sought and the President opposed. "Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case." *Id.* at 693 (citations omitted). The Court held that "the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability," and "since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power." *Id.* at 697.

The Court in *Nixon* also rejected the President's claim of "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id*. at 706. The Court said that "a confrontation with other values

arises" from that claim. *Id*. "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the Courts under Art. III." *Id.* at 707.

The court in *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), rejected a similar claim that the President's removal power was beyond question by the other branches. The President argued that the House Judiciary Committee could not investigate the President's decision to fire nine U.S. Attorneys, allegedly because the U.S. Attorneys brought criminal prosecutions that hurt Republicans and failed to bring criminal prosecutions that would hurt Democrats, because "Congress had no authority to legislate and thus no corresponding right to investigate." *Id*. at 77. "[T]he Executive characterizes the Committee's investigation too narrowly," the court said: "It is not merely an investigation into the Executive's use of his removal power but rather a broader inquiry into whether improper partisan considerations have influenced prosecutorial discretion." *Id*.

As in *Nixon*, "a confrontation with other values arises" from the Arpaio pardon, a confrontation that did not arise from the pardon in *Grossman*. First, the defendant's business establishment in *Grossman* was called a "speakeasy" for a reason: the defendant tried to keep quiet his sale of liquor to avoid legal sanction.

The defendant may not have respected Prohibition, but he did respect the authority of the court. The defendant paid a stiff fine to avoid a prison sentence. Defendant Arpaio, in contrast, flouted the Court's earlier injunction. He said in one television interview that he would "never give in to control by the federal government." He basked in the national attention to his defiance. To this day, the Defendant remains entirely unrepentant.

Second, and relatedly, the pardon here is an intentional usurpation of the Court's authority by the President. President Trump does not pretend that his pardon of the Defendant is based upon the considerations of grace that usually justify the exercise of the pardon power. The President said that the Defendant "was just doing his job" by his defiance of the Court's injunction. In short, unlike the pardon in *Grossman*, the pardon here is not based upon "circumstances which may properly mitigate guilt," but is intended to defeat the Court's authority to punish disobedience to the Court's orders—"an independent means of self-protection"—and perhaps is even intended to endorse the Defendant's contention that he was a "sovereign sheriff" beyond the power of federal courts.

Third, trial courts no longer wield the despotic powers in criminal contempt proceedings that would justify the pardon as a necessary check against abuses by the judiciary. The Court in *Grossman* agreed that "[t]he power of a court to protect itself and its usefulness in punishing contemnors is of course necessary." 267 U.S.

at 122. Contempt of court powers, however, were then "without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction," most notably a disinterested judge. *Id*. The Court asked: "Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied?" *Id*.

The procedure described by the Court in *Grossman*—a bench trial for criminal contempt before the judge whose order the defendant defied—needed reform, and the judiciary made that reform. *See In re Murchison*, 349 U.S. 133, 137 (1955) ("It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.").

The Defendant openly defied an injunction issued by Judge G. Murray Snow in a civil case, *Melendres v. Arpaio*, and the matter was properly referred to a disinterested judge, Judge Susan R. Bolton, for trial of criminal contempt charges. Judge Bolton found beyond reasonable doubt that "Judge Snow issued a clear and definite order," and that the Defendant knowingly and willfully violated that order.

Again, President Trump did not pretend that his full and unconditional pardon of the Defendant was based upon any concern that the trial court erred in that factual finding, and any criticism by President Trump of the procedural

fairness of the trial court's conduct of the trial was perfunctory. The argument that the Defendant was unfairly denied a jury trial is politically contrived and legally flimsy, as this Court well knows. Rather, President Trump agreed with the Defendant that Judge Snow's injunction was not worthy of obedience.

If the Defendant questioned the validity of Judge Snow's civil injunction, then he was required to challenge the injunction through orderly judicial review, rather than ignore the injunction. If that was required of Dr. Martin Luther King, then that should be required of the Defendant as well. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967). "[I]n the fair administration of justice no man can be judge of his own case…. [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Id.* at 320–21.

IV. THE ARPAIO PARDON INTERFERES WITH THIS COURT'S ENFORCEMENT OF THE RIGHTS OF PERSONS UNLAWFULLY DETAINED BY THE MARICOPA COUNTY SHERIFF'S OFFICE.

The pardon here denies the plaintiff class in *Melendres* the remedies allowed by statute for the deprivation of their constitutional rights. The defendant in *Grossman* violated public morality as then expressed by Prohibition, but did not affect the rights of any particular person. The injunction that the defendant violated there was issued in a government enforcement action. The pardon there of criminal contempt did not "interfere with the use of coercive measures to enforce a

suitor's right," which was beyond the President's power. *Grossman*, 267 U.S. at 121.

Congress provided by statute that "any citizen of the United States or other person" injured by the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" may seek relief "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Relief in equity can include mandatory and prohibitory injunctions. Mandatory injunctions require conduct, and prohibitory injunctions forbid conduct. Mandatory injunctions are enforceable through civil contempt, which allows very effective relief that is beyond the President's power to pardon. The effectiveness of prohibitory injunctions largely depends upon the ultimate threat of criminal contempt, however. In *Vuitton*, the defendant paid substantial monetary damages for infringement of Vuitton's and Gucci's trademarks. But the sale of bootleg leather goods as Vuitton or Gucci products was very profitable, and the defendant could and did treat those monetary damages as a cost of business. Criminal contempt for violation of the civil injunction was the only effective remedy for Vuitton and Gucci for infringement of their trademarks.

The plaintiff class in *Melendres* sought and secured an injunction that forbid the Defendant to detain persons on suspicion only of undocumented immigration status, which Judge Snow held deprived the persons detained of rights secured by

the Constitution. Monetary damages from that deprivation are difficult to measure and otherwise inadequate. The Arpaio pardon effectively denies those persons the statutory remedies provided by Congress for the deprivation of rights secured by the Constitution.

CONCLUSION

For the foregoing reasons, the *amici* Members of Congress urge the Court to hold the President's pardon of Defendant Joseph M. Arpaio to be an invalid encroachment on the authority of the Judiciary and remand to the District Court to proceed to sentencing.

Dated: April 29, 2019

Respectfully submitted,

s/ *R. Bradley Miller*

R. Bradley Miller
Spencer G. Scharff

Counsel for Amici Curiae
Certain Members of the Congress of the United States

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the Court's typeface requirements, because it is written in 14-pt Times New Roman font, and contains 3,225 words, excluding the portions excluded under Rule 32(f). This count is based on the word-count feature of Microsoft Word.

Dated: April 29, 2019

s/*Spencer G. Scharff*

Spencer G. Scharff

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 29, 2019 for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

Dated: April 29, 2019

s/*Spencer G. Scharff*

Spencer G. Scharff